Supreme Court of the United States

October Term, 1938

No. 456

UNIVERSAL INSURANCE COMPANY AND
UNIVERSAL INDEMNITY INSURANCE COMPANY
Appellants

against

STATE BOARD OF TAX APPEALS OF THE STATE
OF NEW JERSEY and CITY OF NEWARK
Respondents

REPLY BRIEF OF APPELLANTS

JOHN G. JACKSON
J. G. SHIPMAN
PAUL B. BARRINGER, JR.
Attorneys for Appellants

INDEX

TABLE OF CASES CITED

Supreme Court of the United States

October Term, 1938

UNIVERSAL INSURANCE COMPANY and UNIVERSAL INDEMNITY INSURANCE COMPANY, *Appellants,* *against* STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY and CITY OF NEWARK, *Respondents.*	No. 456

REPLY BRIEF OF APPELLANTS

Appellees' Supplemental Statement of the Case

Before replying to the main argument in the appellees' brief, the appellants wish to make the following observations as to the appellees' supplemental statement of the case.

(1) In Paragraph 1 the appellees refer to a provision in the New Jersey Corporation Law (2 Compiled Statutes 2839, Amended Laws 1929, Chapter 6, p. 18) which they assert the appellants have violated by maintaining their main offices in the State of New York. The appellees contend that the appellants should not be permitted to relieve themselves of liability for taxation in New Jersey by violating their statutory obligations.

The appellants do not concede that in maintaining their principal offices in New York and conducting their business from such offices they have been guilty of any violation of the statute in question. The appellees do not cite any authority to sustain such contention. Whether the action of appellants constitutes a violation of the statute in question is purely a question of New Jersey law. All the facts in the present cases were before the New Jersey courts below and there is nothing in their opinions holding that the appellants were guilty of any violation of the statute.

Whether the appellants have violated this statute, moreover, has no bearing upon the question presented upon this appeal. This court has already held in the case of *Wheeling Steel Company* v. *Fox*, 298 U. S. 193, that a requirement in the law under which a corporation is organized that its "principal" office shall be in the state of incorporation does not prevent such corporation, when it in fact maintains in another state its main office from which its business is directed, from acquiring a "commercial domicile" in such other state so that its intangible property will acquire a business situs and be subject to taxation there. If the appellants have been guilty of a violation of the statute in question, the State of New Jersey, no doubt, has an adequate remedy by appropriate action, but this cannot confer upon the State of New Jersey jurisdiction to tax property which has a situs in New York State.

(2) Under Paragraph 3 the appellees refer to a provision in the Tax Laws (General Tax Law of 1918, Section 203 1-(c)), exempting from taxation property situated out of the State upon which taxes have actually been assessed

and paid. This section is clearly a saving clause and cannot enlarge the power of the State of New Jersey to tax property beyond its borders. It will be noted that this section makes no distinction between tangible and intangible property and if it has the effect which the appellees attribute to it would permit the State of New Jersey to tax tangible personal property situated in the State of New York if such property is not taxed by that State. We cannot believe that the appellees would make such a contention. It is the appellants' claim that the State of New Jersey has no greater rights to tax intangible personal property having a business situs in New York than it has to tax tangible personal property physically located in that State.

(3) Under Paragraph 4 the appellees seek to avoid the finding of the New Jersey Supreme Court that the intangible property of the appellants here sought to be taxed had a business situs in the State of New York. The appellees contend that a holding that intangibles have a business situs at a certain place is a conclusion of law and not a conclusion of fact. This the appellants emphatically deny. The subject will be discussed at a later point in this brief. The appellees further contend that the statement by the New Jersey Supreme Court that the intangible property in question had a business situs in New York is not a finding at all but a mere assumption made by the New Jersey court for the purpose of argument, leading to a decision which would have been the same if a contrary assumption had been made.

A reading of the decision of the New Jersey Supreme Court in the *Newark Fire Insurance* case, which is the basis of the decision in the instant cases, clearly demon-

strates that the statement in the opinion that the property taxed had a business situs in New York was not a mere assumption made "arguendo" but a definite finding of fact upon which the court based its decision. The question which was before the court for decision was the right of the State of New Jersey to tax intangible property which the appellants asserted had a business situs in another State. In passing upon this question it was necessary for the court first to pass upon the facts and determine the existence or non-existence of such business situs, and, secondly, to determine the legal effect of such business situs. The court first reviewed the facts relating to the situs of the property in question and then proceeding to a discussion of the legal questions involved said:

> "As to the jurisdiction to tax prosecutor in this State. This question must *in the light of the proofs* be considered upon the inescapable premise that the prosecutor had its business situs as of October 1, 1934, and still has it in New York; that the securities and property involved have become an integral part of its business situs in New York" (italics ours).

It is difficult to see how the New Jersey Supreme Court could have used clearer language in stating the findings upon which its decision was based.

Appellees' Main Argument

The several points raised by the appellees in their main argument comprise an amplification and restatement of a single argument which is stated more clearly than elsewhere under Points IV and V of appellees' brief. This argument, briefly stated, runs as follows:

1. Based upon the jurisdiction over the person of a taxpayer and the application of the principle of *mobilia sequuntur personam,* the appellees attribute to the State of domicile a fundamental jurisdiction (variously described as an "inherent taxing power" (p. 32) or "underlying taxing power" (p. 37)) to tax a domestic corporation on its intangible property wheresoever situated. This power knows no territorial limits. It is indestructible and cannot be impaired or cut down and its exercise is only subject to certain equitable considerations more or less voluntarily applied by the taxing State to avoid the harshness of actual multiple taxation.

2. The appellees recognize the principle of business situs and concede that intangible property may acquire a situs in a State other than the State of domicile so as to subject it to taxation in such other State. They also recognize that the principle of business situs has raised new problems of multiple taxation which have not yet been solved (Point III, B. p. 10). From this we must assume that in spite of their insistence upon the authority of the case of *Cream of Wheat Co.* v. *County of Grand Forks,* 253 U. S. 325, appellees concede that this case has been qualified if not overruled by more recent decisions of this Court.

3. The appellees' solution of this problem is not clear. They insist that the "inherent" power of the State of domicile to tax all the intangibles of a domestic corporation exists along with the power of the State of business situs to tax upon that basis. Without expressly admitting it they seem to apply that this "inherent" power of the State of domicile is not to be exercised so as to tax intangible property which has acquired a business situs in an-

other State and has actually been taxed there. Whether this is supposed to be a voluntary act of self-restraint on the part of the State of domicile or is a limitation upon its "inherent" taxing power is not made clear.

4. The appellees contend that business situs is not a conclusion of fact but is a pure conclusion of law and results only when intangibles (1) are essential and integral parts of the business conducted in a foreign State; (2) are definitely subjected to taxation by the laws of the foreign State; and (3) have been determined by the authorities of the foreign State (legislative, executive and judicial) to have a business situs within such State (Point V, pp. 11, 35).

So runs the argument of the appellees. In reply the appellants respectfully submit that this whole argument is based upon a fiction, totally disregards the facts, and will result in utter confusion in the taxation of intangibles, which it has evidently been the intention of this Court by its recent decisions to clarify and reduce to principles which are capable of general application.

The so-called "inherent" or "underlying" taxing power of the State of domicile to which the appellees so frequently refer would seem to be based upon a combination of two things—(a) the power of the State of domicile over the person of the taxpayer and (b) the principle of *mobilia sequuntur personam*, which is exalted as a fundamental and undeviating principle of law.

The power of the State of domicile over the person of the taxpayer is admittedly far-reaching. It is so susceptible of abuse, however, that, as was said by this Court in

Union Transit Company v. *Kentucky*, 199 U. S. 194, at page 202: it "may partake rather of the nature of an extortion than a tax." It has been found necessary, therefore, to place territorial limits upon the exercise of this power. With respect to real estate this has always been true, and in spite of the doctrine of *mobilia sequuntur personam*, the increase in the amount and variety of personal property and the location of such property away from the domicile of the owner have made it necessary to place territorial limits upon the taxation of personal property if the taxation of such property is not to become sheer extortion. This Court in numerous decisions has recognized that where tangible personal property has a physical location in a State other than the State of domicile, so as to be within the taxing power of such other State, it is no longer subject to the taxing power of the State of domicile, *Union Transit Co.* v. *Kentucky*, 199 U. S. 194. The appellants contend that if the principal of business situs is to continue to be recognized by this Court, the same limitation must apply with respect to intangible property which has a business situs in another State.

The principle of *mobilia sequuntur personam* gives a color of territoriality to the exercise of the wholly arbitrary power of the State of domicile over a domestic corporation in the taxation of its intangible property. There is nothing "inherent" or "underlying" about this principle. It is based upon a pure legal fiction and is a mere rule of convenience growing out of the fact that such a rule in a simpler age tended *prima facie* to approximate a fair distribution of the burden of taxation in accordance with the value of the services rendered by the State in the

protection of the person and property of the citizen. This Court has repeatedly held, however, that it should not be applied where it does violence to the facts of the case, and it is upon the facts of each case that business situs rests. *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 83; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 235. The development of the doctrine of business situs has been due to a recognition by the courts of facts, as opposed to fiction.

It is natural that the appellees should contend that business situs is a legal conclusion or, rather, a legal result which can only be created by the courts of the foreign State in which such business situs is asserted to exist. This appellants emphatically deny and insist that the business situs of intangible property is a fact as much as is the physical location of tangible property. Admittedly intangible property has no location in space. As this Court said, however, in *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366, it can acquire localization "by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place." Such localization is based upon the facts surrounding the origin and use of the intangible in each case. Once these facts have been established, the localization of the intangible becomes as much a fact as the physical location of tangible property.

It is as much the duty of the State of domicile to recognize and give consideration to the facts establishing a business situs of intangibles in another State as it is the right of such other State to take such facts into consideration if it wishes to tax the property in question. To say that the courts of the State of domicile cannot recognize and give consideration to the existence of the business situs of intangible property in another State until

the taxing authorities of such other State have levied a tax on such property and the courts of such other States have passed upon its business situs, is as indefensible as to say that New Jersey has the right to tax tangible personal property, or even land admittedly in another State, until the taxing authorities of such other State have levied a tax upon such property and the courts of such other State have sustained such tax and have judicially established its physical location.

The argument of the appellees entirely disregards the principle of territorial limits upon the jurisdiction to tax. It ignores the principle of the localization of intangible property which is the basis of the whole conception of business situs.

The appellees seek to bolster their argument by citing decisions of certain States, such as Michigan, in which the principle of business situs is not recognized, either with respect to property of domestic corporations doing business elsewhere or with respect to property of foreign corporations doing business in that State. In answer to this it is sufficient to say that if the State of Michigan does not choose to tax the property of foreign corporations situated within its borders which, under the decisions of the United States Supreme Court, is a proper subject of taxation there, this is a matter of domestic policy, but such self-restraint furnishes no justification whatever for the taxation by the State of Michigan of the property of its own citizens which has a location elsewhere. It might as well be argued that because the State of Michigan did not elect to tax the real estate or tangible property of citizens of a foreign State situated within its borders, it could tax such property of its own citizens situated beyond

its borders. Such a principle would permit each State to make its own rules for taxation in complete disregard of the Constitution of the United States.

The principles for which the appellees contend would result in utter confusion in the taxation of intangible property as the following illustrations will show: Two corporations A and B are organized under the laws of New Jersey which maintained only their registered "principal offices" in that State but transact no business there. Corporation A maintains its head office and does its business in a State such as West Virginia which, upon the principle of business situs, would tax all the intangible property of such corporation. The State of New Jersey, under the appellees' theory, would not tax the intangible property of such corporation. Corporation B, however, maintains its main office in Michigan, which does not tax intangible property of foreign corporations upon the principle of business situs. The State of New Jersey, upon the appellees' theory, would have the right to tax all the intangible property of this corporation.

The illustration could be expanded by assuming that these corporations from the main offices in question carry on business and permanently employ capital in various other States, some of which tax intangible property on the principle of business situs and others do not. Under the appellees' theory, the right of the State of New Jersey to tax the intangible property of each corporation employed in the several States of the union would depend upon the different policy of each such State with respect to its domestic taxation. The situation might be further complicated in the case of Corporation A, by the fact that the State of West Virginia, under the authority of *Wheeling Steel Corporation* v. *Fox, supra,* might also claim a

right to tax all the intangibles of Corporation A except those which are locally taxable. The inevitable confusion resulting from such a situation is clearly what this Court had in mind when in *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204 at p. 209, it said:

> "The inevitable tendency of that view is to disturb the good relations among the states and produce the kind of discontent expected to subside after the establishment of the Union."

The judgment of the New Jersey Court of Errors and Appeals should be reversed.

Respectfully submitted,

JOHN G. JACKSON,
J. G. SHIPMAN,
PAUL B. BARRINGER, JR.,
Attorneys for Appellants.

New York, April 12, 1939.